IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

FIRST APPEAL (ST.) NO. 32096 OF 2004

KANHAIYALAL LAXMIPRASAD JAISWAL
(deceased) through his heirs 1(a) Smt. Ushadevi
wd/o Kanhaiyalal Jaiswal & Ors. .. APPELLANTS

Versus

MUNICIPAL CORPN. FOR GR. BOMBAY ..
RESPONDENTS

Mr. Rajesh Singh h/f S.K. Dubey for appellants

Mr. J. Xavier for BMC respondents

CORAM:-SMT. RANJANA DESAI, J.

DATED:-4-3-2005

P.C.

1. Admit. Respondents waive service. By consent of the parties taken up for hearing forthwith.
2. The appellants are heirs of one Kanhaiyalal Laxmiprasad Jaiswal. Kanhaiyalal was the plaintiff in L.C. Suit No. 2573 of 2000. It appears that after filing of this suit Kanhaiyalal died and then the appellants being

his heirs were brought on record. This suit was filed praying for a declaration that the notice issued under Section 351 of the Mumbai Municipal Corporation Act ("M.M.C." Act for short) dated 11/4/2000 and order dated 24/4/2000 passed by the Ward Officer, H/East Ward are illegal null and void. By the impugned judgment the trial court dismissed the suit and hence this First Appeal.

3. It is stated in the plaint that the plaintiff is in use, occupation and possession of the premises at Survey No. 173, Hissa No. 1 (part) C.T.S. No. 246 at village Kole Kalyan, Kalina Kutir Udyuog Society, Kalina, Santacruz (E), Mumbai, admeasuring about 5400 sq. ft. made partly of patra walls and B.M. Walls and A.C.C. Sheet Roof ("suit premises"). According to the plaintiff the premises are very old and were acquired by the plaintiff prior to 1960. The premises are used by the plaintiff for residence as well as for commercial purpose. The plaintiff is dealing in scrap. In the plaint it is asserted that the plaintiff is in possession of various documents such as assessment bills, N.A. Order, Shop and Establishment Licence etc. It is also the case of the plaintiff that in respect of the suit premises Writ Petition No. 3449 of 1987 was filed. In that writ petition, the matter was referred to D. M. C. for regularisation and by order dated 11/12/1996 the D. M. C. Zone-III regularised the suit premises. A copy of the order purporting to regularise the suit premises is

annexed to the plaint.

4. According to the plaintiff in the month of April, 1999 the officers of the defendant Corporation threatened to demolish the suit premises without following due process of law and, therefore, the plaintiff's father Laxmiprasad Jaiswal filed L.C. Suit No. 2170 of 1999. The plaintiff's father expired on 29/7/99. According to the plaintiff he and other legal heirs were added to the suit. Thereafter officers of the defendant Corporation issued notice in the name of plaintiff's father on 30/10/1999 under Section 351 of the M.M.C. Act alleging unauthorised construction. It is contended that plaintiff Kanhaiyalal then approached the Ward Officer and informed that his father Laxmiprasad has expired. However, again Kanhaiyalal received notice dated 11/1/2000 in the name of his father. The said notice was replied by him. It is the case of the plaintiff that though Laxmiprasad Jaiswal had died, the defendant Corporation issued notice in the name of Kanhaiyalal. Again the notice dated 23/2/2000 under Section 488 of the M. M. C. Act was issued in the name of the father of Kanhaiyalal. Kanhaiyalal then filed L. C. Suit No. 2037 of 2000. It is stated that in that suit on 4/4/2000 the court ordered that the defendant Corporation is at liberty to initiate action of demolition of suit/notice structure but the same shall be done after issuance of notice to heirs and legal representatives of deceased Laxmiprasad Jaiswal. A list furnished

by the plaintiff was taken on record. In view of this order, the plaintiff Kanhaiyalal's advocate did not prosecute the suit. That suit in the circumstances came to be disposed of. It appears that said L.C. Suit No. 2170 of 1999 also came to be disposed of.

5. It is the case of the plaintiff that thereafter the defendant Corporation issued notice dated 11/4/2000. That notice was only addressed to Kanhaiyalal. That notice was in breach of the court's order dated 4/4/2000. According to the plaintiff that notice is bad in law because it was not addressed to all the heirs of Kanhaiyalal. The names of the alleged heirs of Kanhaiyalal are given in the plaint. The plaintiff filed his reply dated 14/4/2000. The plaintiff annexed to the reply the documents on which his case is based. The Ward Officer / H East Ward passed order dated 24/4/2000 stating that the documents produced by Kanhaiyalal do not prove authorisation or the existence of the structure prior to the datum line i.e. 1/4/62. Kanhaiyalal was asked to remove the unauthorised structure within seven days from the date of receipt of the order. The said notice and the said order are challenged by Kanhaiyalal in the instant suit. It appears that during the pendency of the instant suit, Kanhaiyalal also died and his heirs have been brought on record.

6. The defendant corporation filed its written statement denying all the contentions of the plaintiff. At the trial one Virendra Laxmiprasad Jaiswal

constituted attorney of the plaintiff filed his affidavit of evidence.

7. By the impugned judgment the trial court dismissed the suit. From the impugned judgment it appears that the trial court could not locate the documents from the list furnished by the plaintiff. The trial court rejected the list by observing that it is necessary for the parties to produce the documents along with the list serially. The trial court, however, gave opportunity to the plaintiff to rectify the error and submit a fresh list and request the court to mark the said documents. Instead of doing that, the plaintiff filed a pursis and closed his case. It appears that it was argued before the trial court that the suit structure is authorised and legal and that inspite of the court's order in L. C. Suit No. 2170 of 1999 no notices were given to the legal heirs. The trial court rejected this submission by observing that the notice was given to the legal heirs who had replied to the same earlier. The court further observed that no ground was mentioned in the affidavit of the plaintiff as to why the impugned order is illegal malafide and discriminatory. The trial court criticised the conduct of the plaintiff by observing that after rejecting the first list from which the documents could not be located, opportunity was given to the plaintiff to file a fresh list which opportunity was not availed by the plaintiff. The plaintiff could have certainly examined witnesses on his behalf to prove the documents by rearranging them. However, the plaintiff closed his

case. In view of this the trial court dismissed the suit.

8. I have heard at some length Mr. Dubey, the learned counsel appearing for the appellant/plaintiff and Mr. Xavier, the learned counsel for the respondent Corporation. With the assistance of the learned counsel I have perused the record of the case.

9. In the notice dated 11/4/2000 the following description of the unauthorised work is given:

> Work of Brick masonary walls and partly M.S. Sheet Partition with M.S. Pipe/angle form me and A.C. Sheet roof structure gut divided into six galas with rolling shutters.

10. In support of his submission that the suit structure is legal and authorised, the plaintiff has relied on only two documents. One document is the assessment bill. It is pertinent to note that on this assessment bill name of one Mohammed Ali Usmanali is mentioned along with the name of Laxmiprasad Jaiswal. Assessment number is mentioned as R-7596 (23). This assessment bill is of the year 1972. The second document which is relied upon by the plaintiff is the annexure to D.M.C. Zone III's order dated 11/12/96. It is the contention of the plaintiff that all the structures mentioned in the said annexure were regularised by the defendant Corporation. Reliance is placed on entry at

Serial No. 8. It is pertinent to note that under the column “produced documents” the property bill in respect of property assessed under 'No. 7596(22) Serial No. 1732' is mentioned as being the property tax bill of the property of Laxmiprasad Jaiswal. This description does not tally with the assessment bill which is produced by the plaintiff where the assessment number is 7596 (23) and not 7596 (22). This cannot be explained away as a mistake because while in the plaint the plaintiff claims that his property admeasures 5400 sq. ft. in the list appended to the D.M.C.'s order on which the plaintiff is relying the measurements of the structures are given as (1) 47' x 12'.6” (2) 34'.3” x 26”. There is a great discrepancy in the description of the property given in the plaint and that given in the D M C's order. That order, therefore, does not help the plaintiff.

11. It is necessary to examine the plaintiff's claim that notices were not issued to the heirs of Laxmiprasad. Laxmiprasad father of Kanhaiyalal expired on 29/7/99. According to the plaintiff thereafter the plaintiff took out chamber summons and added the plaintiff and other legal representatives to L.C. Suit No. 2170 of 1999. However, again the defendant Corporation issued notice in the name of Laxmiprasad, hence he filed L.C. Suit No. 2037/2000. On 4/4/2000 the court directed that notices be issued to all the legal heirs of Laxmiprasad and L.C. Suit No.

2037 came to be disposed of. L.C. Suit No. 2170 of 1999 was also disposed of. Thereafter fresh notice dated 11/4/2000 was issued to Kanhaiyalal. The plaintiff replied the said notice on 14/4/2000. However, in the reply plaintiff Kanhaiyalal made no grievance that notice was not issued to the other heirs. There is no reference to the other heirs. If Kanhaiyalal had any grievance about the notice having not being given to other heirs he would have stated so. Kanhaiyalal has replied to the said notice as if he is the only heir of Laxmiprasad. It is also significant to note that in the instant suit Kanhaiyalal has given the names of his mother and brothers as heirs of Laxmiprasad, but the instant suit is filed by only Kanhaiyalal. His other brothers and mother have not joined him making a grievance that no notice was issued to them. Therefore, the notice issued by the Corporation is sought to be frustrated by contending that the heirs of Laxmiprasad have not been given notice, when those alleged heirs have not come forward with any grievance. In the plaint the address of the said alleged heirs are not given. It appears that Kanhaiyalal is trying to protect the illegal structure by taking up this plea because he is using it. Even in the instant suit after death of Kanhaiyalal his wife and children have been brought on record as his heirs. The brothers have neither filed any suit, nor have they come forward to prosecute the present suit. Therefore, the

argument that the suit must fail because Laxmiprasad's heirs have not been served must be rejected.

12. It is also important to note that the registration certificate issued under the Shops and Establilshment Act on which the plaintiff has placed reliance is of the year 1981 and it bears registration No. H/E-I-4174 whereas in the list appended to the D.M.C.'s order at Serial No. 8, the shops and establishment licence is shown as bearing No. H/I-4175. Therefore, the premises numbers also do not tally. In any event the documents produced by the plaintiff can never prove that the plaintiff was occupying the suit premises prior to 1/4/62. The trial court gave opportunity to the plaintiff to file a fresh list. The plaintiff could have availed of the opportunity. The plaintiff could have examined witnesses and proved the documents he wanted to rely upon. But the plaintiff chose to close his case, obviously because the plaintiff is unable to produce any documents to establish his case that the suit structure existed prior to the datum line i.e. 1/4/62. In my opinion the trial court has rightly dismissed the suit. There is no merit in this appeal and hence the appeal is dismissed.

13. In view of the above, all the civil applications also disposed of.

14. At this stage the learned counsel for the plaintiff prays that the execution of the impugned decree be stayed. Mr. Xavier objects. In the

circumstances of the case, execution of decree is stayed for a period of four weeks from today.